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STATE OF WISCONSIN
SUPREME COURT
Case No. 2010AP000232-AC from District IV/II

State of Wisconsin,

Plaintiff–Respondent–Cross-Appellant,

v.

Abbott Laboratories, AstraZeneca LP, AstraZeneca Pharmaceuticals, LP, Aventis Behring, LLC f/k/a ZLB Behring LLC, Aventis Pharmaceuticals, Inc., Ben Venue Laboratories, Inc., Boehringer Ingelheim Pharmaceuticals, Inc., Boehringer Ingelheim Roxane, Inc., Bristol-Myers Squibb Co., Dey, Inc., Ivax Corporation, Ivax Pharmaceuticals, Inc., Janssen LP f/k/a Janssen Pharmaceutical Products, LP, Johnson & Johnson, Inc., McNeil-PPC, Inc., Merck & Co. f/k/a Schering-Plough Corporation, Merck Sharp & Dohme Corp. f/k/a Merck & Company, Inc., Mylan Pharmaceuticals, Inc., Mylan, Inc. f/k/a Mylan Laboratories, Inc., Novartis Pharmaceuticals Corp., Ortho Biotech Products, LP, Ortho-McNeil Pharmaceutical, Inc., Pfizer Inc., Roxane Laboratories, Inc., Sandoz, Inc. f/k/a Geneva Pharmaceuticals, Inc., Sicor, Inc. f/k/a Gensia Sicor Pharmaceuticals, Inc., SmithKline Beecham Corp. d/b/a GlaxoSmithKline, Inc., TAP Pharmaceutical Products Inc., Teva Pharmaceuticals USA, Inc., Warrick Pharmaceuticals Corporation, Watson Pharma, Inc. f/k/a Schein Pharmaceuticals, Inc. and Watson Pharmaceuticals, Inc.,

Defendants,

Pharmacia Corporation,

Defendant–Appellant–Cross-Respondent.

BRIEF OF CROSS-APPELLANT THE STATE OF WISCONSIN

ON APPEAL FROM THE
CIRCUIT COURT FOR DANE COUNTY,
JUDGE RICHARD G. NIESS, CIRCUIT JUDGE, PRESIDING
Circuit Court Case No. 04-CV-1709

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STATEMENT OF THE ISSUE ON CROSS-APPEAL

The question certified by the Court of Appeals that is relevant to Wisconsin's cross-appeal is:

> Was the trial court within its authority to reduce the number of Wis. Stat. § 49.49(4m)(a)2. violations found by the jury?

Certification by Wisconsin Court of Appeals, District IV, May 25, 2011 at 3 (CA.Ap. 3[1]). As the Court of Appeals' certification makes clear, that question comprehends two issues: (1) whether the court erred in vacating the finding of 1,440,000 violations; and (2) whether the court, if it correctly vacated the jury's finding, erred by replacing the jury's verdict with its own number. *Id*. at 11-15 (CA.Ap. 5-9). Since Pharmacia is the appellant on the second issue, Wisconsin will discuss only the first issue in the present brief, which is limited to Wisconsin's cross-appeal.

[1] Wisconsin's Cross-Appeal Appendix is cited as "CA.Ap. __ ." Citations to transcripts are to the Clerk's Document Number/Page:Line. For example, R.439/27:10-28:2 means Document No. 439, page 27, line 10 through page 28, line 2.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's order of June 15, 2011 states that the Court will hold oral argument. Wisconsin believes this Court's opinion would likely satisfy the criteria for publication under § 809.23.

STATEMENT OF THE CASE FOR THE CROSS-APPEAL

I. Nature of the Cross-Appeal

At trial, Wisconsin asserted that Pharmacia Corporation, which included its subsidiaries, such as Greenstone, unlawfully caused false average wholesale prices (AWPs) to be made for its drugs, and that these false prices caused Wisconsin Medicaid to overpay when it reimbursed pharmacies' Medicaid claims. The State invoked two Wisconsin statutes, one of which was a Medicaid fraud statute, Wis. Stat. § 49.49(4m)(a)2. That statute provides that "No person, in connection with medical assistance, may . . . [k]nowingly make or cause to be made any false statement or representation of material fact for use in determining rights to a benefit or payment." The jury found Pharmacia liable.

Among other remedies, Wisconsin sought forfeitures under § 49.49(4m)(b), which provides that a person may be "required to forfeit not less than $100 nor more than $15,000 for each statement,

representation, concealment or failure" that violates § 49.49(4m)(a). The jury found that Pharmacia had caused to be made 1,440,000 such "statements [or] representations"—one statement generated each time a Medicaid claim was processed. In post-trial proceedings, the trial court struck the jury's answer, ruling that the jury's method of counting statements was inconsistent with § 49.49(4m). Wisconsin cross-appealed from this decision.

II. Statement of Facts for the Cross-Appeal

A. Background

Undoubtedly the Court will learn more about the background of this case from the facts set forth by the parties in addressing Pharmacia's appeal. The facts relevant to Wisconsin's Cross-Appeal are set forth here. As a threshold matter, since none of the issues certified and accepted for review involves the jury's finding of *liability* under § 49.49(4m), it must be assumed that Pharmacia knowingly made or caused to be made "false statement[s] or representation[s] of material fact for use in determining rights to a Wisconsin Medicaid payment." Certification by Wisconsin Court of Appeals, District IV, May 25, 2011 at 2-3 (CA.Ap. 2-3); Supreme

Court Order, June 15, 2011 at 1 (CA.Ap. 10); R.203, Special Verdict, Question No. 4 (CA.Ap. 13).

B. Evidence supporting the jury's forfeiture verdict that Pharmacia caused 1,440,000 false statements to be made.

1. Evidence that a false statement of AWP was made each time a claim was processed.

In administering the Medicaid program, Wisconsin reimburses pharmacies for prescription drugs dispensed to Medicaid beneficiaries using a formula that includes the AWP of the drug. Specifically, a pharmacy submits a claim for reimbursement via computer to Wisconsin[2] when it dispenses a drug to a Medicaid beneficiary. R.435/138:10-18 (CA.Ap. 42). The pharmacy transmits to Wisconsin the beneficiary's Medicaid information, the "national drug code" associated with the drug dispensed, the prescribing doctor, and the pharmacy's "usual and customary" price for the drug (the price that a cash-paying customer would be charged). *Id*; R.436/68:18-69:1, 158:10-25 (CA.Ap. 45-46, 48).

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[2] Wisconsin utilizes a private contractor, EDS, to process its claims. R.436/69:8-16 (CA.Ap. 46). Since this fact has no significance to the issues on appeal, the State simply refers to the claims processing as being performed by "Wisconsin."

Upon receiving such a claim, Wisconsin's computer system fills three fields with pricing information: (1) the "usual and customary" price provided by the pharmacy with the claim; (2) Pharmacia's AWP for the drug in question (and Wisconsin's current discount rate); and (3) for certain drugs, a Maximum Acquisition Cost (MAC), which is a reimbursement limit set by Wisconsin on the basis of information obtained from various sources. R.436/61:6-15, 160:6-19, 185:4-10 (CA.Ap. 44, 50-51). The amount eligible for reimbursement on any claim is the lowest of the three fields (after adding to the last two fields a separate "dispensing fee" to cover the pharmacy's cost of dispensing the drug). R.436/61:6-15, 119:2-7 (CA.Ap. 44, 47); R.437/162:2-23 (CA.Ap. 55). The computer applies this algorithm and transmits to the pharmacy Wisconsin's approval of the claim, the reimbursement calculated according to the algorithm, and the co-pay for which the beneficiary is liable. The pharmacist then dispenses the drug to the patient. R.436/159:1-8 (CA.Ap. 49).

In the twelve years covered by this lawsuit (June 3, 1994 through December 2006), more than 2.2 million Medicaid claims for reimbursement for Pharmacia drugs were processed by Wisconsin. R.437/14:8-9, 14:16-15:9 (CA.Ap. 53-54). In each of those claims, Wisconsin's data system

stated a specific AWP for the Pharmacia drug through the above process in order to apply the reimbursement algorithm. R.436/61:6-15, 69:8-16, 119:2-7, 185:4-10 (CA.Ap. 44, 46-47, 51). In over 1.44 million of these claims, not only was a statement of AWP generated, but the AWP-determined amount was the lowest of the three amounts determined in the algorithm and thus controlled the reimbursement. R.437/14:16-15:9 (CA.Ap. 53-54).[3] In the remaining claims, either the "usual and customary" price, or the MAC price plus dispensing fee, was the lowest amount, and therefore the drug's AWP did not determine the amount of the reimbursement. Although a false statement of AWP was generated in processing those claims as well, Wisconsin voluntarily excluded those statements from its forfeitures count.

2. Evidence that Pharmacia knowingly caused the false AWPs that were made each time a claim was processed.

All of the Pharmacia AWPs that were generated in processing claims were false prices. R.434/49:2-6 (CA.Ap. 38). Pharmacia knew this. A

[3] Wisconsin's expert testified that the AWP-determined price controlled the reimbursement for 1.5 million claims. R.437/14:16-15:9 (CA.Ap. 53-54). However, Wisconsin subsequently agreed to shorten the time period slightly, and therefore reduced the number to 1.44 million.

Pharmacia internal document called its AWP a "fabricated" price. R.304/PX-457 (CA.Ap. 81).

Pharmacia also knew that Wisconsin Medicaid's formula that determined reimbursement payments included a drug's AWP. R.304/PX-457 (CA.Ap. 89); R.305/71-80, Beimfohr Video Trans. at 103:10-13 (CA.Ap. 70). And it knew that its *false* AWPs would be filled into the formula. Wisconsin Medicaid obtained AWPs from First DataBank, a national price publisher. R.435/137:3-20 (CA.Ap. 41). Pharmacia knew this and supplied First DataBank with pricing information for Pharmacia's drugs and verified the AWPs that First DataBank published. R.305/71-80, Beimfohr Video Trans. at 106:14:10-107:1 (CA.Ap. 70); R.305/43-58, Kennally Video Trans. at 81:8-118:2 (CA.Ap. 72); R.438/133:18-135:16 (CA.Ap. 57-59).

Pharmacia also intended that its false AWPs would be generated each time Wisconsin Medicaid processed a claim for its drug. Wisconsin offered extensive evidence that one purpose of Pharmacia's inflated AWPs was to create a "spread" between what pharmacies and other providers paid to acquire drugs and the higher amounts that they were reimbursed for the drugs. R.304/PX-457 at 2 (CA.Ap. 80). Pharmacia "marketed" that

spread—i.*e.*, used it to induce providers to purchase and dispense Pharmacia drugs (both brand name and generic) rather than competing drugs on the basis of the profit that could be made from the inflated reimbursement from third-party payers, such as Wisconsin Medicaid.

Pharmacia denied marketing the spread at trial and admitted it would be unethical. R.438/195:6-196:14 (CA.Ap. 60-61). Nonetheless, Wisconsin offered extensive evidence of marketing the spread, including:

(1) evidence that before patents expired on Pharmacia's brand drugs, Pharmacia inflated the drugs' AWPs to make the spreads on its brands more attractive to providers than other brand drugs, *see, e.g.*, R.304/PX-485 (CA.Ap. 73) ("with our AWP 25% greater than Catalog in most cases there is more 'hidden' profit in our products"); PX-493 at 2 (CA.Ap. 75) ("we were asked to change the AWP back to 25% so the marketplace would respond favorably");

(2) evidence that after patents expired on brands—and generic competition entered the market—Pharmacia marketed its brand drugs based on the spread created by false AWPs, *see, e.g.*, R.304/PX-457 (CA.Ap. 79-89) (Pharmacia memo regarding "Medicaid Opportunities" based on

"spread" created by Pharmacia's false AWP for its brand drug versus its generic competitors); and

(3) extensive evidence that Pharmacia used enormous spreads on its generic and post-patent brand drugs to market those drugs to providers, *see, e.g.*, R.304/PX-830 (CA.Ap. 90) (contract proposal offering Toposar for $60, and reminding provider that the AWP was $698.65, a markup of 1,164%, and setting forth "profit" for the provider of $638.65); R.304/PX-834 (CA.Ap. 92-93); R.304/PX-611 (CA.Ap. 95) (marketing profit created when reimbursed using Pharmacia's inflated AWP of $100.31 for drug that cost $2.66); R.304/PX-613 (CA.Ap. 98) (noting "strategy" of "creat[ing] spreads at more competitive level vs. Teva," another generics manufacturer); R.304/PX-490 (CA.Ap. 102) (marketing the fact that the "spread from acquisition cost to reimbursement on [Pharmacia's] multi-source products offered on the contract give [American Oncology Resources] a wide margin for profit").

III. Procedural History

A. In pre-trial proceedings, Wisconsin set out its method of counting forfeitures.

Before trial, Wisconsin's trial brief informed the trial court and Pharmacia of how the number of false statements would be counted and that it intended to prove 2.2 million violations at trial:

> [A] "violation" of [§ 49.49(4m)] occurred every time Pharmacia caused false price information for a product … to be published in a Medicaid claim. The State intends to prove at trial that Pharmacia violated this statute in excess of 2.2 million times during the relevant time period.

R.284 at 15 (CA.Ap. 34). During arguments on the motions *in limine*, Wisconsin again put forth its method:

> MR. BLUSTEIN: . . . For forfeitures, … every time that there is a publication essentially, that's a violation. Every time one of their false AWPs is populated in our AWP reimbursement machine, that's a publication that is the subject of forfeiture.
>
> THE COURT: All right. ….

R.431 at 202:12-18 (CA.Ap. 36). Pharmacia raised no objection to this theory *in limine*.

B. At trial, the jury returned a verdict of 1,440,000 false statements with no objection being made to Wisconsin's evidence or argument regarding how to count them.

The number of false statements or representations Pharmacia had made or caused to be made was treated as a disputed issue of fact to be decided by the jury. Hence, the trial court submitted Question No. 5 to the jury, asking: "How many such false statements or representations of material fact for use in determining rights to a Wisconsin Medicaid payment did Pharmacia Corporation knowingly make or cause to be made?" R.302, Special Verdict at 3 (CA.Ap. 14).

In closing argument, Wisconsin argued—as it had said before trial that it would—that a "false statement" within the meaning § 49.49(4m)(a)2 had been caused to be made each time Wisconsin processed a claim for a Pharmacia drug. Wisconsin argued to the jury that the "false AWP[s] are put into the [reimbursement] formula and they are used to pay the claims of the Wisconsin pharmacists," and that there were 1,440,000 such claims processed over the relevant 12-year period. R.441/108:17-109:15 (CA.Ap. 63-64). Accordingly, Wisconsin asked the jury to find that Pharmacia caused 1,440,000 false statements for use in determining Medicaid payments. *Id*. at 109:14-15 (CA.Ap 64).

Wisconsin's evidence and argument were the *only* input the jury received on how to count the number of false statements. Pharmacia did not object during Wisconsin's closing argument when Wisconsin asked the jury to answer Jury Question No. 5 with the number of false statements made in processing claims. R.441/108:17-109:15 (CA.Ap. 63-64). Pharmacia's closing argument did not mention Jury Question No. 5 or the issue of counting false statements. R.441/115:4-180:13. After finding liability under § 49.49(4m)(a)2, the jury agreed with Wisconsin on the number of false statements, answering "1,440,000" on Question No. 5. R.302, Special Verdict at 3 (CA.Ap. 14).

C. In post-trial proceedings, the trial court vacated the jury verdict based on a newly-formulated interpretation of § 49.49(4m), which it used to supply a new count.

Although Pharmacia had ignored the "number of false statements" issue during the trial, after the verdict, it moved (in a footnote in its post-trial brief) to change the jury's answer to Question No. 5 to zero. R.310 at 28 n.5. On May 15, 2009, the trial court held that as a matter of law, Wisconsin's method of counting false statements was invalid. R.322, Decision & Order on Def.'s Motions after Verdict on Forfeitures, May 15, 2009 (CA.Ap. 16-21). The court asserted that by counting the number of

false statements generated by the processing of claims, Wisconsin's method of counting was "not directed at the actual culpable conduct of Pharmacia, but at the consequences of that conduct." *Id*. at 4 (CA.Ap. 19). The court therefore vacated the jury verdict. *Id*. at 3 (CA.Ap. 18).

However, the court denied Pharmacia's motion to change the jury's answer to zero, because it found there was "clearly evidence in this record that would support the imposition of forfeitures under § 49.49(4m)" and held that the number "cannot be determined without a full analysis of the factual record, and further argument from counsel." *Id*. at 5 (CA.Ap. 20). It rejected Pharmacia's contention that it lacked authority to conduct such proceedings—a ruling that Pharmacia is presumably challenging in its own appeal to this Court. R.331, Decision & Order on Forfeitures Procedure, June 18, 2009. The parties agreed that any further proceedings on forfeitures should be conducted on the basis of the existing trial record. *Id*. at 1.

In its resulting decision on forfeitures, the trial court set out its findings of fact, stating that the "jury's verdict determined the evidence on [the following] points to be largely clear and convincing":

(1) all of Pharmacia's published AWPs were false;

> (2) Wisconsin reimbursed pharmacies for dispensing certain Pharmacia drugs based on these published AWPs;
>
> (3) Wisconsin received all of its false Pharmacia AWP pricing information from compendia published by First DataBank which, in return, obtained it from Pharmacia; and
>
> (4) Pharmacia knew that Wisconsin would and did rely on the false AWPs published in First DataBank in determining the amount to reimburse the participating pharmacies for dispensing certain Pharmacia products.

R.376, Decision & Order on Remaining Forfeitures Issues, Sept. 30, 2009 at 2 (CA.Ap. 23). The trial court then determined that the number of violations should be counted not by reference to the number of false AWPs generated by the claims, as the jury had done, but by reference to the number of false AWPs that First DataBank sent to Wisconsin in its monthly (and later semi-monthly) electronic transmissions of Pharmacia AWPs.[4] *Id.* at 3 (CA.Ap. 24).

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[4] Having decided to use First DataBank's transmission of AWPs as the basis for counting false statements, the trial court ruled that a false statement of a drug's AWP was made (1) the first time a drug's AWP was sent by First DataBank to Wisconsin, and (2) each time First DataBank thereafter sent monthly (later semi-monthly) updates to Wisconsin showing which AWPs had changed since the previous update. The court held that once a false AWP was transmitted to Wisconsin on a particular drug code, each subsequent update was an implied representation that the AWP of any drug not shown in the update as having a changed AWP remained at its previously reported level, and hence was "a new representation caused to be made by Pharmacia which, again, knew that Wisconsin Medicaid was relying on its pricing through First DataBank." Decision &

In counting these statements transmitted by First DataBank, the trial court also imposed a further limitation over Wisconsin's objection (which is not at issue in this appeal): the transmission by First DataBank of a particular false AWP would be deemed a false statement of "material" fact only if a claim was actually paid on the basis of that AWP before the next monthly AWP for the drug was transmitted. *Id*. at 4-7 (CA.Ap. 25-28). With these rulings, the court found the evidence supported a finding of 4,578 false statements of AWP that Pharmacia had caused to be made. *Id*. at 7 (CA.Ap. 28). After reviewing various factors it deemed in aggravation or mitigation of Pharmacia's conduct, the court imposed a forfeiture amount of $1,000 per violation, for a total forfeiture amount of $4,578,000. *Id*. at 8-9 (CA.Ap. 29-30).

D. The Court of Appeals certified the vacatur of the forfeiture verdict for review and provided an analysis of the relevant issues.

Both sides appealed from the trial court's assessment of forfeitures. Pharmacia's appeal limited its forfeiture challenge to the contention that

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Order on Remaining Forfeitures Issues, Sept. 30, 2009 at 3-4 (CA.Ap. 24-25). In its appeal, Pharmacia did not challenge the issue of how to count forfeitures. Regarding forfeitures, it argued only that no forfeitures whatsoever were proper because the trial court lacked power to award them.

once the trial court had vacated the jury's finding of 1,440,000 false statements, it lacked authority to conduct further proceedings, so that the award of forfeitures should be reversed in its entirety. *See* Brief of Appellant in the Court of Appeals, at 36-40. In its cross-appeal, Wisconsin argued, as it does here, that its method of counting false statements had been correct, so that the jury's finding of 1,440,000 false statements should be reinstated. In the alternative, Wisconsin argued that even under the alternative theory of counting false statements the trial court had used, it had undercounted through an erroneous construction of the "materiality" requirement. Wisconsin also argued that the trial court had considered two improper "mitigating" factors in determining the amount of forfeiture to impose for each false statement.

The Court of Appeals' opinion of May 25, 2011 decided none of these forfeiture-related issues. Instead, it certified to this Court the following question: "Was the trial court within its authority to reduce the number of Wis. Stat. § 49.49(4m)(a)2 violations found by the jury?" Certification by Wisconsin Court of Appeals, District IV, May 25, 2011 at 3 (CA.Ap. 3). In connection with this certification, the Court of Appeals discussed (1) whether the statute permitted Wisconsin's method of counting

false statements,[5] and (2) if it did not, whether the trial court had the authority, after vacating the jury's finding of 1,440,000 violations, to determine the correct number. *Id*. at 11-15 (CA.Ap. 5-9). (As noted at the outset of this brief, since the second of these issues was raised by Pharmacia's appeal, it will not be discussed further in this brief, which deals only with Wisconsin's cross-appeal.)

As the Court of Appeals noted regarding the certified forfeiture question, the resolution of whether the jury's finding of 1,440,000 false statements was proper "lies in the interpretation of § 49.49(4m)(a)2." *Id*. at 12 (CA.Ap. 6). In analyzing that issue, the Court of Appeals discussed *State v. Menard,* 121 Wis.2d 199, 358 N.W.2d 813 (Ct. App. 1984), which held that each re-publication of an advertisement bought by a retailer

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[5] The Court of Appeals' opinion did not certify for review the two other forfeiture issues Wisconsin raised in its cross-appeal: whether the trial court, in recalculating the number of false statements based on the number of transmissions of false AWPs by First DataBank to Wisconsin, incorrectly interpreted the "materiality" requirement, and whether, in setting the amount per violation, the court considered two improper "mitigating" factors. The Court of Appeals did not analyze these issues and neither is fairly comprehended in the certified question of whether the trial court was "within its authority to reduce the number of Wis. Stat. § 49.49(4m)(a)2 violations found by the jury." (CA.Ap. 3, 5-9). Since this Court's order of June 15, 2011 states it will confine its review to the certified questions, it is clear to the State that this Court intended that these issues should be left to the Court of Appeals in the first instance in any further proceedings that may occur in that court once this Court answers the certified questions. (CA.Ap. 10). Thus, Wisconsin does not address the two issues in this brief.

created a separate forfeiture under a regulation prohibiting the ads, but noted that the issue presented by the present case had not been argued there. May 25, 2011 Certification at 13 & n.7, *discussing Menard,* 121 Wis.2d at 201-03 (CA.Ap. 7).

The Court of Appeals also discussed two federal False Claims Act cases: *U. S. v. Bornstein*, 423 U.S. 303 (1976), and *U. S. v. Ehrlich*, 643 F.2d 634 (9th Cir. 1981). As the Court noted, in *Bornstein*, a subcontractor who submitted three false invoices to the general contractor was held liable for only three forfeitures even though the general contractor had incorporated the subcontractor's false billing into thirty-five separate invoices to the government. May 25, 2011 Certification at 13-15, *discussing Bornstein,* 423 U.S. at 307-08, 311-13 (CA.Ap. 7-9). As the Court of Appeals further noted, *Ehrlich* distinguished *Bornstein* and affirmed a separate penalty for each separate inflated voucher a contractor's misstatements to a mortgagee caused that mortgagee to submit to the government, because the contractor knew the mortgagees would submit the vouchers each month. May 25, 2011 Certification at 14-15, *discussing Ehrlich*, 643 F.2d at 637-638 (CA.Ap. 8-9). The Court of Appeals commented:

> This case seems to lie somewhere in between *Ehrlich* and *Bornstein*—the precise number and frequency of inflated Medicaid payments based on AWP would be unknown to Pharmacia, but it is quite foreseeable that multiple claims would be made based on a single AWP transmission. However, neither of those cases analyzed WIS. STAT. § 49.49, so their applicability to this case is limited.

May 25, 2011 Certification at 15 (CA.Ap. 9).

ARGUMENT

I. STANDARD OF REVIEW.

Whether the jury's finding of 1,440,000 violations was based on an incorrect interpretation of § 49.49(4m)(a)2 is a question of law for which review is *de novo. Tammi v. Porsche Cars N. Am., Inc.*, 2009 WI 83, ¶ 25, 320 Wis.2d 45, 768 N.W.2d 783 (review of a trial court's interpretation of a statute is *de novo*).

II. THE TRIAL COURT ERRED IN VACATING THE JURY'S FINDING OF 1,440,000 FALSE STATEMENTS.

Under § 49.49(4m)(a)2, knowingly causing a "false statement or representation" to be made "for use in determining rights to a benefit or payment" constitutes a violation. Under § 49.49(4m)(b), a forfeiture is assessed for "each statement." In finding 1,440,000 "false statements or representations," the jury accepted Wisconsin's argument that a false

representation of a drug's AWP was generated each time a claim was processed for a Pharmacia drug. Wisconsin's claim processing procedure in effect asked, as to each such claim, "What is this drug's average wholesale price?" The answer came back: "This drug's AWP is X." That false statement or representation of the AWP was then used to determine how much to pay the pharmacy. *See supra*, Section II.B.1. And it was Pharmacia's conduct that caused these false statements of AWP to be made. *See supra*, Section II.B.2.

The trial court, however, vacated the verdict of 1,440,000 statements. R.322 (CA.Ap. 16-21). The court concluded that although § 49.49(4m) required counting the false statements Pharmacia made to First DataBank *and* the false statements of AWP that Pharmacia caused First DataBank to make to Wisconsin, the statute, as a matter of law, did not allow the counting of the subsequent false statements of AWP that were caused to be made when Wisconsin processed reimbursement claims. *Id*. at 4 (CA.Ap. 19). The court held that "as a matter of law, [the 1,440,000] number does not measure the number of violations subject to forfeitures under § 49.49 (4m)(b)." *Id*. at 3 (CA.Ap. 18). According to the court, "rather than focus on the **culpable** conduct of the defendant," the number

"in fact, measured something different, i.e. the **consequences** of the culpable conduct." *Id*. at 2 (CA.Ap. 17) (emphasis in original).

In so holding, the trial court erred. As Section A shows, the jury's method of counting violations is consistent with the plain language of § 49.49(4m). As Section B shows, the history and purpose of the statute support giving effect to that plain language. As Section C shows, under the correct interpretation of the statute, the jury's verdict was supported by credible evidence. As Section D shows, the trial court's reasons for vacating the verdict do not withstand scrutiny.

A. The jury's method of counting violations was consistent with the plain language of § 49.49(4m).

It is for the legislature to define forbidden conduct. *State v. Wolske*, 143 Wis.2d 175, 187, 420 N.W.2d 60 (Ct. App. 1988). An integral aspect of deciding what is unlawful is determining whether an unlawful act involves one or several distinct offenses. In other words, "to define the violation is to define the unit of prosecution." *Nat'l Ass'n of Home Builders v. Occupational Safety & Health Admin.*, 602 F.3d 464, 467 (D.C. Cir. 2010); *State v. Tappa*, 127 Wis.2d 155, 164-65, 378 N.W.2d 883 (1985) (examining legislative intent to determine "allowable unit of prosecution").

Under the plain language of § 49.49(4m)(a)2, the legislature prohibited causing *any* "false statement" to be made for use in determining rights to a Medicaid payment. The legislature defined the "unit of prosecution" as "each statement" caused to be made. *See* § 49.49(4m)(b), which provides that "A person who violates this subsection may be required to forfeit not less than $100 nor more than $15,000 for *each statement*, representation, concealment or failure." (Emphasis added.)

"The purpose of statutory interpretation is to discern the intent of the legislature." *Landis v. Physicians Ins. Co. of Wisconsin, Inc.*, 2001 WI 86, ¶14, 245 Wis. 2d 1, 10, 628 N.W.2d 893, 898. "To determine this intent, we look first to the plain language of the statute." *Id*. "If the language of the statute clearly and unambiguously sets forth the legislative intent, it is our duty to apply that intent to the case at hand and not look beyond the statutory language to ascertain its meaning." *Id*. *See also Tammi*, 2009 WI 83, ¶26, 320 Wis. 2d 45, 60, 768 N.W.2d 783, 790-9. This is true for penal statutes as well. *State v. Kittilstad*, 231 Wis.2d 245, 262, 603 N.W.2d 732 (1999).

Under the plain language of the statute, therefore, Pharmacia committed a violation each time a claim was processed because its conduct

caused, with each such processing, the making of a false statement about the drug's AWP that was used to determine the payment on that claim. Wisconsin was therefore within the plain language of the statute in asking the jury to base its count of false statements on the statements that were caused to be made at the claims processing level.

It is irrelevant that these statements or representations of AWP generated to process claims were made electronically within Wisconsin's data processing system. *All* relevant price statements in this case occurred electronically. Pharmacia submitted its price data to First DataBank electronically. The false statements that were counted by the trial court to determine the number of violations—transmissions of false AWPs by First DataBank to Wisconsin—were purely electronic statements. R.435/137:11-20 (CA.Ap. 41). And Wisconsin's system generated an electronic representation of AWP each time it processed a claim. *See supra*, Section II.B.1. These statements or representations of AWP in each case were no less "statements" or "representations" within the meaning of the statute simply because they were in electronic form.

B. The history and purpose of § 49.49(4m) support interpreting the statute according to its plain meaning.

Section § 49.49(4m) was enacted pursuant to 1985 Act 269, which both defined the prohibited conduct and provided for forfeitures for each violation. (CA.Ap. 107). When enacted, the assessment of forfeitures was the sole remedy for the prohibited conduct. The section providing for "other remedies," § 49.49(6), was not enacted until ten years later, by 1995 Act 27. (CA.Ap. 109). The fact that it was exclusively through the assessment of forfeitures that the legislature originally meant to deter the proscribed Medicaid fraud shows the importance of giving the forfeiture provision its plain meaning rather than a restricted one.

Similarly, the purpose of the Medicaid Fraud statute—to prevent parties from causing Wisconsin to waste taxpayer money making fraudulent Medicaid payments—argues against any interpretation of § 49.49(4m) that is more restrictive than its plain language. The matter was put plainly by Attorney General Van Hollen, who emphasized the importance of this issue by arguing on behalf of Wisconsin during the forfeiture hearing. As he said, it is in "the best interest of the people of the state of Wisconsin to make sure that when their taxpayer dollars are fraudulently taken by others, that we don't just get those monies back, tell

them not to do it again, and say the game is over. We need to make sure that those who violate the law also have punishment for violating the law." R.443, Post-Trial Hearing Transcript, May 12, 2009 at 77:21-78:3 (CA.Ap.67-68).

C. The jury's number of false statements was supported by credible evidence.

Under the correct interpretation of the statute, the jury's finding must be reinstated, because it was supported by credible evidence (in fact, unrebutted evidence). *Morden v. Cont'l AG*, 2000 WI 51, ¶¶38-39, 235 Wis. 2d 325, 351, 611 N.W.2d 659, 672 ("Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it."). As noted above, since none of the issues certified and accepted for review involves the jury's finding of *liability* under § 49.49(4m), it must be assumed that Pharmacia knowingly made or caused to be made false statements or representations of material fact for use in determining rights to Wisconsin Medicaid payments. R.302, Special Verdict, Question No. 4 (CA.Ap. 13). Credible evidence supports the jury's additional finding that Pharmacia caused 1,440,000 such statements to be made.

Specifically, credible evidence supports the jury's finding that:

(1) A representation of AWP was generated each time a claim was processed and that those AWPs were "of material fact for use in determining the rights to a … payment." § 49.49(4m)(a)(2). Wisconsin presented evidence that each time a Medicaid claim for a Pharmacia drug was processed, Wisconsin's computer system filled three fields with pricing information, including Pharmacia's AWP for the drug in question. R.436/61:6-15, 119:2-7, 160:6-19, 185:4-10 (CA.Ap. 44, 47, 50-51).

(2) Pharmacia's AWPs were false and Pharmacia knew it. In fact, Pharmacia *defined* its AWPs as "fabricated" prices. R.434/49:2-6 (CA.Ap. 38); R.304/PX-457 at 3 (CA.Ap. 81). *See also* R.376 at 2 (CA.Ap. 23) (trial court found "clear and convincing" evidence that "all of Pharmacia's published AWPs were false.")

(3) Pharmacia caused the false representations of AWP to be made. Wisconsin received Pharmacia's false AWPs from First Databank, which received its pricing information from Pharmacia. R.435/137:3-20 (CA.Ap. 41); R.305/43-58, Kennally Video Trans. at 81:8-118:2 (CA.Ap. 72); R.438/133:18-135:16 (CA.Ap. 57-59). *See also* R.376 at 2 (CA.Ap. 23) (trial court found "clear and convincing" evidence that "Wisconsin received all of its false Pharmacia AWP pricing information

from compendia published by First DataBank which, in return, obtained it from Pharmacia.")

(4) During the claims period, over 1.4 million claims for Pharmacia's drugs were processed and paid. R.437/14:16-15:9 (CA.Ap. 53-54).

D. The trial court's reasons for overturning the jury's verdict are unsound.

1. The principle of construing penal statutes narrowly cannot defeat the plain language of §49.49(4m).

To support its narrow interpretation of §49.49(4m), the trial court noted that § 49.49(4m) is a penal statute and that such statutes are construed strictly. R.322 at 3 (CA.Ap. 18). The Court of Appeals likewise mentioned this principle, May 25, 2011 Certification at 12-13 (CA.Ap. 6-7), but clearly questioned whether this principle was determinative in this case. It is not.

This Court has "long recognized that the rule of strict construction of penal statutes is not a 'rule of general or universal application; …. Sometimes a strict and sometimes a liberal construction is required, even in respect to a penal law, because the dominating purpose of all construction is to carry out the legislative purpose.'" *State v. Kittilstad*, 231 Wis.2d 245,

262, 603 N.W.2d 732, 739-40 (Wis. 1999), *quoting State v. Boliski*, 156 Wis. 78, 81, 145 N.W. 368 (1914). To put it simply, the principle of construing penal statutes narrowly cannot defeat the plain language of § 49.49(4m).

2. The *Menard* court expanded the forfeiture count, rejecting a stricter interpretation.

The trial court invoked the Court of Appeals' decision in *State v. Menard,* 121 Wis.2d 199, 358 N.W.2d 813 (Ct. App. 1984), to reason by analogy in support of its decision that § 49.49(4m) did not cover the false statements of AWP made in processing each claim. As the Court of Appeals' certification in the present case noted, however, *Menard* did not address the issue for which the trial court cited it.

Menard involved an administrative regulation issued under Wis. Stat. §100.20, regulating misleading price comparison advertising. Menard submitted for newspaper publication eight distinct advertisements making price comparisons with its competitors' product. 121 Wis.2d at 201-02. Each of the eight advertisements was found to be in violation of the regulation. *Id*. at 202. The State requested forfeitures under § 100.26(6), which authorizes a forfeiture of "not less than $100 nor more than $10,000 for each violation of an order issued under § 100.20." *Id*. The trial court

held that Menard committed only eight violations, based on the number of distinct advertisements that were created, disregarding the number of editions in which those ads were published. *Id*. at 201.

The Court of Appeals reversed. *Id*. It agreed with the position the State had argued to it: that "a violation occurs each time an improper advertisement is published," and that "[e]ach newspaper edition constitutes a separate publication." *Id.* at 202. The Court remanded the case for inclusion of the additional violations consisting of the re-publication of the same advertisements in subsequent editions. *Id.* at 205.

The trial court in the present case wrote that *Menard* supported its decision to vacate the jury verdict because "a forfeiture was not imposed for each time the publication was read or relied upon by the reader (which would have been the analogous situation to the State's case here)." R.322 at 4 (CA.Ap. 19). But as the Court of Appeals noted in its certification, the State in *Menard* never *asked* for a forfeiture each time the publication was read or relied on. May 25 Certification at 13 (CA.Ap. 7). The regulation in *Menard* was structured differently from § 49.49(4m) and would have lent itself poorly to such an argument. *See* Ch. ATCP § 124.03. In contrast, what *can* be said about *Menard* is that of the two interpretations of the

relevant statute that were argued to the Court of Appeals, the court rejected the "stricter" interpretation, and chose the one that fulfilled the purpose of the statute, even though it maximized the number of requested forfeitures.

3. The "foreseeability" requirement in *Bornstein* and *Ehrlich* supports upholding the jury verdict.

The trial court also looked to *U. S. v. Bornstein*, 423 U.S. 303 (1976), and *U. S. v. Ehrlich*, 643 F.2d 634 (9th Cir. 1981), two cases under the federal False Claims Act. R.322 at 4 (CA.Ap. 19). *Bornstein* and *Ehrlich* faced a choice between counting as forfeitures the false statements made directly by the defendant versus counting false statements that the defendants caused to be made, *i.e.*, statements one step "downstream." To make that choice, both cases analyzed whether it was foreseeable to the defendant that its upstream false statements would cause a larger number of downstream false statements. It was the difference in that foreseeability that explains the two cases' different results.

In *Bornstein*, a subcontractor sent three separately invoiced shipments of falsely labeled radio-kit components to a general contractor, who then billed the government in thirty-five separate invoices. 423 U.S. at 307. The U.S. sued the subcontractor and sought a forfeiture for each of the thirty-five invoices from the general contractor. *Id.* at 308. The U.S.

Supreme Court held that the government could only recover based on the three invoices prepared by the subcontractor. *Id*. at 311-13. According to the Court, the "fact that [the general contractor] chose to submit 35 false claims instead of some other number was, so far as [the defendant] was concerned, wholly irrelevant completely fortuitous and beyond [the defendant's] knowledge or control." *Id*. at 312.

In *Ehrlich*, the defendant contractor submitted an inflated construction invoice to the owner, who had a federally subsidized mortgage. 643 F.2d at 636. The owner/mortgagee incorporated that inflated cost (without knowing it was inflated) into a set of monthly vouchers claiming interest subsidies to be applied to the mortgagee's loan. *Id*. The Ninth Circuit affirmed assessment of a separate penalty for each of seventy-six inflated vouchers for the interest subsidies the defendant caused the mortgagee to submit. *Id*. at 638. *Ehrlich* rejected the argument that *Bornstein* required only one forfeiture to be assessed against the contractor because he "did but one act"—inflating his costs. *Id.* at 637-38. The contractor "knew a false claim would be submitted each month" by the mortgagee, and the contractor "could have prevented the filing of additional false claims," but instead, "did nothing and gained a continuing benefit

from the inflated interest subsidies." *Id*. at 638. *Ehrlich* concluded that "it would defeat the purposes of the Act, given [defendant's] knowledge and control of the situation, to limit his liability to one forfeiture." *Id*.[6]

From the point of view of foreseeability, the situation that faced the trial court in the present case was similar to *Ehrlich*, although in *Ehrlich*, the chain of foreseeable downstream false statements had one step, whereas here it has two. In *Ehrlich*, the contractor's false submission to the mortgagee foreseeably generated a one-step downstream set of monthly false claims for interest subsidies by the mortgagee. In the present case, the false AWPs from Pharmacia generated a two-step chain of downstream false statements. At the first step, based on Pharmacia's pricing information, First DataBank made false statements when it transmitted Pharmacia's false AWPs to Wisconsin; at the second step, false statements of AWP were generated within Wisconsin's computers each time a claim for a Pharmacia drug was processed.

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[6] *See also United States v. Inc. Vill. of Island Park*, 888 F. Supp. 419, 441 (E.D.N.Y. 1995) (applying the holding of *Ehrlich* in counting forfeitures).

In dealing with this two-step chain of causing false statements to be made, the trial court's "counting" reasoning was an unsatisfying attempt to split the difference. It rejected Pharmacia's request to count the number of violations by reference to the original upstream transmissions of false statements from *Pharmacia* to *First DataBank.* Instead, in *Ehrlich* fashion, it counted violations by reference to a downstream number: the number of false AWPs transmitted by *First DataBank* to *Wisconsin.* But it shrank at applying *Ehrlich's* reasoning to its logical conclusion, for it refused to move one step further downstream and count the number of false statements generated in connection with actually processing the claims.

For three reasons, stopping at the transmission stage made no sense and failed to respect *Bornstein*, *Ehrlich,* or the purposes of § 49.49(4m).

a. The claims-level statements were foreseeable.

Section 49.49(4m)(a)2 does not merely outlaw *making* false statements or representations. It also outlaws *causing* statements or representations *to be made.* Pharmacia is just as culpable for *causing* a false statement to be made as for *making* one personally. Thus, when a defendant should reasonably foresee that its conduct will result in a cascading number of false statements further down the causal chain,

counting that defendant's forfeitures by reference to the subsequent false statements respects the *Bornstein* principle of tying counting to culpable conduct. This is what distinguished *Ehrlich* from *Bornstein.* In *Bornstein,* the lying subcontractor had no reason to think his three false invoices would cascade at the next level downstream into thirty-five false statements. In *Ehrlich,* the lying contractor knew his false invoice would produce additional false statements in monthly applications for interest subsidies.

In terms of foreseeability, the false statements at the two-steps-downstream "claims processing" stage were as foreseeable as those at the one-step-downstream "transmission from First DataBank" stage. As the Court of Appeals' certification decision noted, "it is quite foreseeable that multiple claims would be made based on a single AWP submission." May 25, 2011 Certification at 15 (CA.Ap. 9). The evidence at trial supported the fact that Pharmacia had every reason to know that day in, day out, a very large number of claims for reimbursement of its drugs would be paid by Wisconsin's Medicaid program by generating false statements of AWP. *See supra,* Section II.B.2. at 7-9; see also the evidence discussed immediately below.

b. Pharmacia intended to increase the number of statements.

Not only were the false statements at the claims processing stage foreseeable, but there was credible evidence that Pharmacia's *intention* in creating and disseminating false AWPs was to *increase the number* of those statements. The record, and particularly the extensive evidence that Pharmacia "marketed the spread" created by false AWPs, supports this conclusion. *See supra*, Section II.B.2. at 7-9. For example, an internal memo entitled "Xanax Medicaid Opportunities" demonstrates that Pharmacia explicitly promoted the fact that its false AWPs would end up in Wisconsin's Medicaid reimbursement formula for each claim submitted. R.304/PX-457 (CA.Ap. 79-89).

The memo instructed its sales force to promote to pharmacists the fact that dispensing brand Xanax to "Medicaid patients … leads to a greater profit margin" for pharmacists (as compared to dispensing the significantly less expensive generic equivalent) when seeking reimbursement from states, including Wisconsin Medicaid. *Id*. at 1, 10 (CA.Ap. 79, 89). The memo pointed out that AWP is a "fabricated, published price that many reimbursement programs are tied to, including Medicaid." *Id*. at 3 (CA.Ap. 81). The memo set out Xanax's fabricated AWP and Wisconsin's

Medicaid reimbursement formula of AWP-10%, and then filled the AWP into the formula to determine the reimbursement, just like Wisconsin Medicaid does. *Id*. at 10 (CA.Ap. 89).

The fact that there was evidence that Pharmacia's aim in inflating the AWPs was to increase the number of false statements at the claims-processing stage means that it is irrelevant that Pharmacia could not foresee "the precise number and frequency" (to use the Court of Appeals' phrase, CA.Ap. 9) of false statements that would be generated at that stage. Where behavior is designed to increase the number of claims, the defendant should not be heard to defend against counting the number of false statements made in the course of processing those claims on the ground that it did not know exactly how successful its efforts at increasing the number of claims would be.

Indeed, from this perspective, Pharmacia is even more culpable than the defendant in *Ehrlich* for the multiple subsequent false statements. Both defendants "knew [multiple] false claim[s] would be submitted," and "could have prevented the filing of additional false claims," but instead "did nothing and gained a continuing benefit from the inflated" prices. 643 F.2d at 638. However, unlike Pharmacia, the *Ehrlich* defendant did nothing

that was intended to *increase* the number of false claims beyond the number he knew would result.

c. The method of counting forfeitures must not ignore the language of the statute.

As *Bornstein* instructs, the method of counting forfeitures must not "ignore the plain language of the statute." 423 U.S. at 311. The lower court in *Bornstein* had held the defendant liable for only *one* forfeiture because only one contract (between the defendant and the prime contractor) was involved in generating the false claims. The Supreme Court reversed the holding because the "language of the statute focuses on false claims, not on contracts." 423 U.S. at 311. Here, the Medicaid fraud statute focuses on "false statement[s] … for use in determining rights to a … [Medicaid] payment." § 49.49(4m)(a)2. Nothing better epitomizes the false statements targeted by the statute than a false statement at the claims level that was generated to determine the amount of a Medicaid payment. Here, as in *Ehrlich*, there is no "foreseeability" problem that prompted *Bornstein* to limit its count. Thus, counting anything short of one forfeiture for *each* false statement that is "for use in determining" a *distinct* Medicaid payment would be arbitrary and would "ignore the plain language of the statute." 423 U.S. at 311.

In sum, by invoking the "culpability" principle of *Bornstein* to limit Pharmacia's number of forfeitures to the number of false statements Pharmacia caused to be made at the first downstream level, the trial court erred. The logic of *Bornstein* and *Ehrlich* should have led the court to count violations according to the false statements generated at the claims-processing level—statements that were foreseeable, which Pharmacia worked to increase, and which were targeted by the plain language of the statute.

In some circumstances, such as the present case, that process will produce a very large number, and it should. Where a sophisticated defendant like Pharmacia foreseeably and purposefully causes a cascade of harmful false statements downstream at the claims-paying level, it can only serve the legislative intent and the public interest to count Pharmacia's forfeitures as the plain language of the statute demands.

CONCLUSION AND REQUEST FOR RELIEF

By vacating the jury's number of false statements, the trial court ignored the plain language of the statute, failed to take account of the statute's history and purpose, and misapplied analogous case law. Wisconsin respectfully requests that this Court answer the certified

question relevant to forfeitures by holding that the trial court erred in vacating the jury's finding of 1,440,000 false statements.

Dated: August 15, 2011

Respectfully submitted,

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CERTIFICATION

I hereby certify that the foregoing Brief of Cross-Appellant conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stats., for a brief and appendix produced with a proportional serif font. The length of this brief is 7,677 words.

Dated this 15th day of August, 2011.

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CERTIFICATION

In accordance with § 809.19(12)(f), Wis. Stats., I hereby certify that the text of the electronic copy of the Brief of Cross-Appellant is identical to the text of the paper copy of the Brief of Cross-Appellant.

Dated this 15th day of August, 2011.

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